No. 771 19

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

E. A. TALIAFERRO

Petitioner

VS.

JULIA PRETTNER, et al.,

Defendants,

WM. T. MARCOLLO AND LOUIS CANNELORA, named and sued as Marcollo, Cannelora & Marcollo,

Defendants and Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES THEREOF.

NOW COMES THE PETITIONER ABOVE NAMED AND PETITIONING THIS HONORABLE COURT FOR THE ISSUANCE OF A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS IN THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE RESPECTFULLY REPRESENTS AS FOLLOWS:

Petitioner requests the issuance of a Writ of Certiorari to review the decision of the District Court of Appeals of the State of California First Appellate District, Division One. The case carried number Civil 16397 in the Docket before the Appellate Court. It is reported in 135 A. C. A. 207 California Advance Reports. The California Official bound volume has not yet

reached the shelves. The Pacific Reporter official bound volume reports the case in 286 Pac. 2nd 977. The Appellate Court opinion is attached and affixed hereto in extenso as Exhibit "B". The decision was handed down on August 22, 1955. A petition for a rehearing was filed which was denied on the 21st day of September, 1955. Subsequently a petition for a hearing before the Supreme Court of the State of California was filed and denied on October 19, 1955. The denial of a hearing on October 19, 1955 was tantamount to a final decision by the highest court of the State of California. On January 16, 1956 this Court granted an extension of time to file this Petition up to and including March 17, 1956.

THE GROUNDS UPON WHICH THE JUDGMENT IS SOUGHT TO BE REVIEWED ARE AS FOLLOWS:

I

That Petitioner's rights, privileges and immunities under the Constitution of the United States have been infringed upon in that the decision and opinion of the Appellate Courts of the State of California have sanctioned and approved procedure of the Lower Court which lacked due process and in effect amounted to a taking of Petitioner's property without due process. (28 U.S.C.A. Sec. 1257)

II

The Petitioner's rights, privileges and immunities under the Constitution of the United States have been infringed upon in that the decision and opinion of the Appellate Courts of the State of California have sanctioned and approved procedure of the Lower Court which has deprived Petitioner of the equal protection of the law as guaranteed by the Constitution of the United States. (28 U.S.C.A. Sec. 1257)

III

That the Appellate Courts of the State of California in this case have by their ruling sanctioned a departure from the usual course of Judicial Procedure so as to require the Supervision of the High Court. (28 U.S.C.A. Sec. 1257)

Specifically in support of the foregoing grounds petitioner points to the following:

Petitioner originally filed a complaint against the Respondent's named herein and others in the Superior Court of Contra Costa County in the State of California. The Superior Court in the State of California is the County Court of general jurisdiction throughout the county not limited by amount and has jurisdiction over all matters both legal and equitable as distinguished from the Inferior Courts in California such as the Municipal Courts and Justice's Courts throughout a county whose jurisdiction is limited as to amount and certain precise equitable matters in which they have been given limited authority to act by statutory sanction. The first complaint filed by Petitioner in the California Superior Court alleged in substance that Petitioner had been induced to sign a promissory note by the executors of the Estate of Thomas Atalic upon representations that petitioner was indebted to the Estate of Atalic in the sum of $3,025.56. That petitioner, believing the representations of the said executors of the Estate did sign the note, and gave as security, therefore, a deed of trust upon certain business properties owned and operated by him. The complaint further alleged that Julia Prettner was an heir of the Estate of Atalic and inherited therefrom the note and deed of trust executed by Petitioner in favor of the said estate. The complaint then alleged that Julia Prettner, after receiving all title and beneficial interest in and to said note and deed of trust, collected the same from Petitioner under the compulsion and duress of the threat of immediate foreclosure upon petitioner's properties. The complaint next alleged that Petitioner paid the face value of said note and accrued interest, costs, and attorney's fees in an amount of $4,828.07. The complaint also alleged that after payment of this sum to Julia Prettner's agents, Petitioner discovered that the representation that he had owed the Estate of

Atalic any money was untrue and that when he had paid the sum of $4,828.07 to Julia Prettner in full discharge and payment of the note in question, he had paid off a note and deed of trust for which in truth and in fact there was a complete failure of consideration as well as fraud in the inducement to his signature. The complaint then goes on to allege that the discovery of the fraud and failure of consideration took place after the payment of the funds in question to Marcollo and Cannelora who acted as Julia Prettner's Attorneys in the matter. The complaint also alleged that Marcollo and Cannelora collected the money in question as agents for Julia Prettner with full knowledge of the existence of all of the facts contained therein which showed fraud and failure of consideration. The complaint also charged that Marcollo and Cannelora exacted an amount as Attorney's fees as part of their collection of the money involved which amount was in excess of the amount allowed by law under Section 2924C of the California Civil Code which governs Attorney's fees in connection with foreclosures and sales under deeds of trust. Marcollo and Cannelora appeared in the action and demurred to the complaint under Section 430 of the California Code of Civil Procedure. This section sets forth all of the grounds upon which a defendant in a civil action can demur to a complaint under the laws of the State of California. It contains both general and special grounds, the general ground that the complaint does not state facts sufficient to constitute a cause of action and nine other grounds which go to defects in the form of the complaint rather than its substance. Respondents Cannelora and Marcollo demurred on practically every ground provided for in Section 430 of the California Code of Civil Procedure. Among the special grounds urged by the defendants was the ground permitted by the California Code that separate causes of action had not been separately stated in separate counts. Petitioner readily admits that in his first complaint

filed he did not separate any of the various charges into separate counts. The trial Court of the County of Contra Costa (Superior Court) sustained the demurrer of Marcollo and Cannelora granting Petitioner ten days to amend. The trial court did not specify which of the grounds of demurrer it had sustained. It did not indicate whether or not it thought the complaint insufficient to state a cause of action or what if any of the special grounds of demurrer it thought should be sustained. Petitioner, in considering the task of amending, believed in good faith that his complaint was adequate in every respect save and except it did not separate the cause of action against Julia Prettner and the cause of action against her agents Marcollo and Cannelora which would of necessity require different elements of proof to show their culpable knowledge of the untrue representations and the failure of consideration with respect to the execution of the note. Consequently Petitioner did amend and timely file his amended complaint separating these two causes of action. The trial court thereupon, on motion of the Respondents, ordered the amended complaint stricken from the record.. It is this situation which the California Appellate Court referred to as being no effort "to meet objections sustained in the first complaint." Here it is submitted the appellate court based its entire opinion, and it is apparent from a reading of the opinion which is attached as "Exhibit B" that the sole justification that court urges to support the right of a court to strike from its files a complaint which otherwise states a good cause of action, was that no effort was made to change the first complaint after a demurrer was sustained thereto. Thus we have the California Court's entire opinion based upon a misconception of the state of the record which appears from the face of the record. This mistake of the Court, with reference to its statement that no appreciable effort had been made to amend Petitioner's first complaint was called to the

Appellate Court's attention in the petition for a rehearing denied on September 21, 1955, and again in the petition for hearing before the California Supreme Court which was denied on October 19, 1955. The federal question involved was called to the attention of the Supreme Court of the State of California in a petition for a hearing after an adverse decision by the District Court of Appeals. The language calling to the California State Supreme Court's attention the denial of petitioner's constitutional rights and the presence of lack of due process and the denial of equal protection of the law in this litigation was in the following language appearing on Page 2 of Petitioner's petition for a hearing before said State Supreme Court:

"THE NATURE OF THE CASE"

> "Petitioner has never had his day in Court. His first amended pleading presented after the sustaining of a demurrer with leave to amend was stricken from the record by the trial court without an opportunity to amend. The action of the trial court was upheld by the District Court of Appeals without its even discussing the question as to whether or not Appellant's amended complaint as stricken from the record stated a cause of action. Every deficiency which Appellant claims existed with reference to the decision of the Appellate Court in its opinion which is attached hereto was called to the Court's attention in a petition for rehearing. The net result of the Appellate Court's opinion is that the trial court may strike an amended complaint from the record <u>which states a cause of action</u> if its allegations closely resemble the allegations of the original complaint filed and if it does no more than cure one of the grounds of special demurrer where there are several irrespective of the merits of the other special grounds. The District Court's opinion not only fails to point out that the amended complaint of Appellant stricken did not state a cause of action but it also fails to point out that any of the special grounds of demurrer which it says Appellant made no attempt to cure were well taken. Anyone reading this opinion would gather the impression that it made no difference as to whether the Appellant had stated a cause of action or not. They would also gather from the opinion that the trial Judge is the sole Judge as to whether any serious effort was made to meet the objections presented to the original complaint. The opinion would indicate that it makes no difference as to whether or not those objections were good."

Petitioner had no reason to anticipate, prior to the decision of the District Court of Appeal and the denial of his petition for rehearing before said District Court of Appeal, that the California Appellate Courts would turn their backs upon their own well-

established line of decisions which clearly held that petitioner had stated a good cause of action in his complaint filed before the California State Courts and thus close the door of their tribunals to his right as a citizen of the State and of the United States to assert a perfectly valid claim in law which amounted to a property right and strike it from the records of their courts and thereby deprive petitioner of his right to his day in court in assertion of an established property right thus, in effect, taking petitioner's property without due process and denying him the equal protection of the laws of the state of his residence. How can any litigant be said to have received due process or the equal protection of the law when a decision against him is based upon a mistaken conception of the record which clearly appears from the face of the record? When Petitioner separated his causes of action to eliminate that substantial objection to his complaint as set forth in Respondent's demurrer below, in the face of the trial court's nebulous ruling completely failing to indicate in the slightest degree the defects it found existing in Petitioner's first complaint, Petitioner did make an appreciable effort to eliminate the objections sustained to the first complaint. Furthermore the decision of the California Courts in this case are in their essence a taking of property without due process. Not one California case can be found where any complaint which stated a cause of action, no matter how crudely put, was ever stricken on the ground of sham.

When Petitioner's complaint was stricken from the files of the California Courts in this case, he was deprived of his right to assert a claim for $4,828.07 and he was deprived of it on a ground that finds authority in absolutely no other decided California case. The Appellate Court in the case at bar cited two California cases in support of its opinion. Both of these cases were cases where the complaints involved could not and did not

state a cause of action. No California case was referred to and it is submitted none could be found prior to this one where any California Court had ever stricken from its files a complaint as sham which in fact stated a cause of action no matter how imperfectly. If petitioner had failed to state a cause of action in his first complaint and had amended, still not stating a cause of action, there might be some support in the California law for striking the amended complaint as sham. Yet, even here, the volumes abound with cases where litigants have been given three and even up to seven attempts to cure defects in a complaint. The California Volumes abound with decisions proclaiming the liberality with which amendment should be allowed in order to allow the removal of imperfections. The only cases where complaints have been stricken are cases where no cause of action has been stated and, in fact, in the only two cases the Court cites in its opinion in this case the facts show them to be cases where the plaintiff could not possibly state a cause of action under the facts and circumstances involved. It is submitted that a careful study of the record of this case, as well as the law governing petitioner's claim, will show that petitioner has been arbitrarily and unjustly barred from presenting a claim lawful and valid upon its face to the courts of proper jurisdiction in the State of his residence. This being true he has been denied due process. Indeed has not his property right in his claim been taken without due process? Certainly he has been denied the equal protection of the laws which have been accorded all other citizens having similar claims which have been honored by the courts of the State of California time and again. This is the nature of Petitioner's cause and these are his Constitutional Rights which he contends have been abridged by the decision in this case. These are the matters that he is respectfully requesting this Court to review. It is respectfully submitted that a cursory glance

at Petitioner's Amended Complaint, which is attached and affixed hereto as "Exhibit A," will indicate that it states a cause of action against Respondents Marcollo and Cannelora.

WHEREFORE Petitioner prays that this honorable court issue a Writ of Certiorari directed to the District Court of Appeals of the State of California, First Appellate District, Division One, in the case of E. A. Taliaferro, Petitioner Vs. Julia Prettner, et al., Wm. T. Marcollo and Louis Cannelora, Defendants and Respondents, Civil No. 16397, ordering and commanding said Court to transfer all records and proceedings therein contained to this honorable court for its scrutiny and review.

E. A. Taliaferro

E. A. Taliaferro

STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA) SS

E. A. Taliaferro, being first duly sworn, deposes and says:

That he is the Petitioner in the above entitled action; that he has read the foregoing PETITION FOR WRIT OF CERTIORARI and knows the contents thereof, and that the same is true of his own knowledge, save and except as to the matters which are therein stated on his information or belief and as to those matters he believes it to be true.

E. A. Taliaferro

Subscribed and sworn to before me
this 15 day of March 1956
(Seal) John F. Truman
NOTARY PUBLIC
In and for the county of Contra Costa
State of California
My Commission Expires Oct. 3, 1959

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF CONTRA COSTA

E. A. TALIAFERRO

PLAINTIFF

VS.

JULIA PRETTNER, MARCOLLO, CANNELORA & MARCOLLO, FIRST DOE TO TENTH DOE BLACK AND WHITE CORPORATION, JOHN ROE & RICHARD ROE, A PARTNERSHIP

NO. R-2714

AMENDED COMPLAINT

Now comes the plaintiff above named and leave of court being first had and obtained files this his amended complaint and for cause of action alleges to wit:

I.

That the true names of First to Tenth Doe, Black and White Corporation, John Roe and Richard Roe, a partnership are unknown to the plaintiff and plaintiff prays leave to insert the true names of said individuals if as and when the same become known to nim with appropriate charging allegations.

II.

That prior to July 26, 1950 plaintiff purchased from one Thomas Atalic, Lots 153, 154, 155, 157, 168 and 169 in Rancho San Pablo, in the City of San Pablo, County of Contra Costa, State of California.

III.

That during the year of 1945 the said Thomas Atalic stated to plaintiff that there was due and owing and unpaid upon said lots delinquent taxes, the exact amount of which was unknown to plaintiff and that the title to said lots would have to be quieted and that he proposed to have one Louis Cannelora, Attorney at Law, who was an expert in real property matters quiet title to said lots and that he, Thomas Atalic estimated that the cost of quieting title to said lots and the payment of delinquent taxes would be in the neighborhood of $1,700 which sum Atalic said he proposed to advance for the account of said plaintiff and that plaintiff could repay said sum at his convenience.

IV.

That said sum of $1,700 or thereabouts was charged by said Atalic upon his books and records against the plaintiff.

V.

That said Thomas Atalic died a short time prior to the 26th day of July, 1950, that prior to his death Thomas Atalic made no demand upon plaintiff for payment of said sum of $1,700 or any sum.

VI.

That on or about the 26th day of July, 1950 one Carl Atalic and Martin Atalic stated to plaintiff that they had been appointed and were acting as the Executors of the Estate of Thomas Atalic, deceased, and that they had discovered among the accounts of said Thomas Atalic sums of money due and owing to said Thomas Atalic from said plaintiff and that taxes upon the properties occupied by the plaintiff at the Davis Auto Exchange, in the City of San Pablo, had accumulated and that it would be necessary for said plaintiff to execute to the Estate of said Thomas Atalic a note and deed of trust in order to enable them to clear the title and all charges against the properties purchased from said Thomas Atalic and occupied by plaintiff at the Davis Auto Exchange

and to enable them to properly probate the estate of said Thomas Atalic.

VII.

That plaintiff signed on July 26, 1950 a note in the amount of $3,025.56 bearing interest at the rate of 6%, relying upon said statements of said Carl Atalic and Martin Atalic and in full belief that they would pay all charges of quieting title to the lots hereinabove described and taxes due and owing, current or delinquent and he gave as security therefore a deed of trust upon the real property upon which his place of business, known as the Davis Auto Exchange in the City of San Pablo, was located.

VIII.

That one Julia Prettner, an heir to the Estate of Thomas Atalic, deceased, succeeded to the title of said note and deed of trust.

IX.

That on or about the 23rd day of December, 1952 said Julia Prettner served notice upon plaintiff that she would sell all properties covered by said deed of trust at a Trustee's sale unless plaintiff paid to her the sum of $4,828.07 representing the face value of said note hereinabove referred to, plus accumulated interest and taxes including the sum of $350 as and for attorneys fees for the firm of Marcollo, Cannelora and Marcollo.

X.

That plaintiff paid said sum of $4,828.07 under duress, compulsion, oppression and threat of sale of said properties owned by him at the site of the Davis Auto Exchange in the City of San Pablo in order to save title to his said properties and to prevent an interruption of his business and deprivation of possession of his business properties.

XI.

That plaintiff is informed and believes and therefore alleges that said quiet title proceeding referred to hereinabove was

never completed and that the taxes upon plaintiff's said properties were never paid by said Thomas Atalic during his lifetime or any representative thereof after his death and that therefore said note referred toherein was entirely devoid of consideration and plaintiff signed said note on the basis of misrepresentation and fraud and paid to the firm of Marcollo, Cannelora and Marcollo, said sum of $4,828.07 as a direct and proximate result thereof.

XII.

That the sum of $350, paid to said firm of Marcollo, Cannelora & Marcollo, as and for Attorneys' fees was illegal, unlawful and excessive under the laws of the State of California and that the acts and conduct of all of the defendants hereinabove alleged were wilful and malicious.

WHEREFORE plaintiff prays a judgment for the sum of $4,828.07 as compensatory damages and $20,000 punitive damages together with all costs of suit herein incurred.

SECOND CAUSE OF ACTION

For a second separate and distinct cause of action, plaintiff alleges as follows to wit:

I.

Plaintiff incorporates each and every allegation contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII of the first Cause of Action of plaintiff's complaint, set forth hereinabove with the same force and effect as if said allegations had been set forth inddetail herein.

II.

That at the time of the collection of the said sum of $4,828.07 referred to in plaintiff's first cause of action, defendants Marcollo, Cannelora and Marcollo were acting as the agents and for and on behalf said Julia Prettner and the other defendants.

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III.

That plaintiff is informed and believes and therefore alleges that at all times referred to hereinabove said defendants. Marcollo, Cannelora and Marcollo were acting and did act with full knowledge of all matters and things set forth hereinabove and in the First Cause of Action.

WHEREFORE Plaintiff prays judgement for the sum of $4,828.07 as compensatory damages and $20,000 punitive damages together with all costs of suit herein incurred together with such other relief as to this Honorable Court shall seem meet and fitting in the premises.

E. A. Taliaferro

E. A. Taliaferro

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COUNTY OF CONTRA COSTA)
) SS.
STATE OF CALIFORNIA)

E. A. Taliaferro, being first duly sworn, deposes and says:

That he is the plaintiff in the above entitled amended complaint; that he has read the same and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are stated on information and belief and as to those matters he believes it to be true.

E. A. Taliaferro

Plaintiff In Propria Persona

Subscribed and sworn to before me
this 14 day of December 1953
Marjorie Christensen
Notary Public in and for the County
of Contra Costa, State of California
My Commission Expires Aug. 20, 1957

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EXHIBIT B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FILED
Aug. 22 1955
WALTER S. CHISHOLM,
Clerk
By _____
Deputy

E. A. TALIAFERRO,

Plaintiff and Appellant

VS.

JULIA PRETTNER, et al.,

Defendants

WM. T. MARCOLLO AND LOUIS CANNELORA, named and sued as Marcollo, Cannelora & Marcollo

Defendants and Respondents

Plaintiff appeals from a judgment dismissing the case as to defendants Wm. T. Marcollo and Louis Cannelora, entered on an order striking the amended complaint from the files.

QUESTION PRESENTED.

Did the court abuse its discretion in striking from the files an amended complaint which made no appreciable effort to meet the objections which the court had sustained to the original complaint?

RECORD.

Plaintiff filed a complaint. Defendants Marcollo and Cannelora demurred.* Their demurrer was sustained with leave to amend. Thereafter plaintiff filed an amended complaint. Said

*Although Julia Prettner is charged in both complaints as a defendant and fictitious named defendants are included, apparently the only defendants appearing in the case are Marcollo and Cannelora.

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defendants moved for an order striking it from the files and dismissing the action as to them. The court granted the motion. Thereupon judgment dismissing the cause as to said defendants was entered.

AMENDED COMPLAINT - FIRST COUNT.

It alleges that prior to July 26, 1950, plaintiff purchased from Thomas Atalic certain described real property; that during 1945 said Atalic informed plaintiff that delinquent taxes thereon were unpaid, the amount of which was unknown to plaintiff, and that the title would have to be quieted and that he proposed to have defendant Cannelora, who is an attorney at law, quiet the title; that the cost of quieting title and paying the delinquent taxes would be approximately $1,700, which sum Atalic proposed to advance "for the account of said plaintiff," and which plaintiff could repay at his convenience. Said sum of $1,700 was charged by Atalic against plaintiff on Atalic's books. Atalic made no demand upon plaintiff for payment of said sum. He died a short time prior to July 26, 1950. About that date Carl Atalic and Martin Atalic told plaintiff they were the executors of Thomas Atalic's estate and had discovered among his accounts sums of money owing from plaintiff; that taxes upon the properties occupied by plaintiff at the Davis Auto Exchange in the City of San Pablo (it is not clear as to whether this is the same property above mentioned) had accumulated and that it would be necessary for plaintiff to execute to the Atalic estate a note and deed of trust xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx in order to clear the title and all charges against the property purchased from Thomas and occupied by plaintiff at the Davis Auto Exchange and to enable them to properly probate Thomas' estate.

On July 26, 1950, plaintiff signed a note (whether to Thomas' estate or to Carl and Martin does not appear) in the amount of $3,025.56 relying upon said statements of Carl and Martin and in full belief that they would pay all charges of quieting title to

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the described lots and the taxes current or delinquent. He gave as security therefore a deed of trust on the Davis Auto Exchange property. Julia Prettner, an heir of Thomas, succeeded to the title of said note and deed of trust. About December 23, 1952, said Julia served notice on plaintiff that she would sell all properties covered by said deed of trust at trustee's sale unless plaintiff paid her $4,828.07, being the principal of said note, accumulated interest and taxes, "including the sum of $350 as and for attorneys fees for the firm of Marcollo, Cannelora and Marcollo." (Whether this was fees for the quiet title action or in connection with the note or deed of trust does not appear.) Plaintiff paid said sum under duress, compulsion and threat of sale of said properties owned by him at the site of Davis Auto Exchange in order to save title to his said properties and to prevent interruption of his business and deprivation of possession of his business properties. Plaintiff is informed that said quiet title proceeding was never completed, the taxes on plaintiff's properties were never paid, and that said note was entirely devoid of consideration. Plaintiff signed said note on the basis of misrepresentation and fraud and paid "to the firm of Marcollo, Cannelora and Marcollo, said sum of $4,828.07 as a direct and proximate result thereof." The sum of $350 paid to said firm (by whom does not appear) as and for attorneys' fees was illegal, unlawful and excessive (in what respect does not appear), and the acts of all defendants were willful and malicious. Plaintiff then asks judgment for $4,828.07 as compensatory damages and $20,000 punitive damages.

This count is identical with the allegations of the original complaint as to which a demurrer, both general and special, was sustained. As to this count the court was justified in ordering it stricken as a cause of action, as plaintiff had no right, after the sustaining of a demurrer to the original com-

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plaint, to file an amended complaint merely repeating the allegations of the original complaint without change or amendment. If the court erred in sustaining the demurrer to the original complaint plaintiff's remedy was to stand on it, permit a judgment to be entered, and then appeal, and not by again filing the same complaint.

SECOND COUNT.

Plaintiff incorporates by reference all the allegations of the first count and the alleges that at the time of the collection of said $4,828.07 defendants were acting as the agents of Julia Prettner and the other defendants (fictitious named defendants). It is not alleged that said defendants have not paid said sum to their principals. Plaintiff is informed that at all times said defendants acted with full knowledge of all matters alleged. Again the prayer is for $4,828.07 as compensatory damages and $20,000 punitive damages.

None of the ambiguities and uncertainties specified in the demurrer to the original complaint is cleared up. Nor was any attempt made to join Carl and Martin Atalic, the only persons alleged to have made the misrepresentations or promises. This defect in parties defendant was one of the grounds of the demurrer.

It is very difficult to spell out even the nucleus of a cause of action against defendants. Even though such a possibility exists, it does not affect the real question here, which is whether the trial court abused its discretion in striking the amended complaint when no serious effort was made to meet the objections sustained to the first complaint. The only change made was to increase the ambiguities and uncertainties, still without pleading a cause of action against defendants.

The courts are, and should be, liberal in allowing pleadings to be amended, but when, as here, the court reasonably concludes that the plaintiff has made no real effort to comply with the permission once given him to amend his complaint, the amended

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complaint becomes nothing but a sham. The court is not required to give him another opportunity. The situation here is quite similar to that in Neal V. Bank of America, 93 Cal. App. 2d 678, where the court held the amended complaint to be a sham justifying the trial court in striking it from the files and dismissing the action. As there said, "No attempt is made to state new facts, or to state the facts more fully, or to bring in any new parties. . . . . (I)n determining defendant's motion, the court was fully justified in examining and considering the original complaint. (Citations.) So considered, the 'amended' complaint was no better than the original complaint . . . . (T)he courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes . . . . The fundamental principle running through the cases is that a court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration." (Pp. 682, 683.)

Just as in Wilson v. Shea, 194 Cal. 653, 659, where the trial court's order striking an amended complaint from the files was affirmed, the amended complaint here "utterly fails and in fact does not attempt to remedy the defects" in the plaintiff's previous pleading and "is in all its essential averments but a repetition" thereof.

Under the circumstances of this case, the fact that plaintiff is a layman and appeared in propria persona, would not compel the trial court to give him another chance to amend.

The court had jurisdiction to strike plaintiff's amended complaint on the ground that it was frivolous and a sham. The order was clearly not an abuse of discretion. The complaint having been stricken, the judgment of dismissal was, of course, proper.

The judgment is affirmed.

BRAY, J.

WE CONCUR:

PETERS, P. J.

FRED B. WOOD, J

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

It is of course Petitioner's contention that the California Appellate Court of the First Appellate District Division One has by its arbitrary and unjustified action in handing down a decision contrary to the law of its own State and contrary to the fundamental precepts of all established rules of common law as recognized in that State has denied Petitioner equal protection of the law and has in effect taken his property without due process. The general rule upon which Petitioner relies to give this Court jurisdiction is aptly stated in Dunne v. Merchants' Legal Stamp Company 120 N.E. 370; 231 Mass. 113 at page 375 N.E. There it was said with reference to the Fourteenth Amendment of the Constitution:

> "It may not be doubted that the protection afforded by that amendment is available in appropriate instances against decisions by the state courts. Its prohibitions are directed to all instrumentalities of government within the several states, including judicial, executive and legislative. The law as administered, interpreted and enforced by the state courts may deprive one of his property without due process of law, or deny to one the equal protection of the laws as well as a statute enacted by the Legislature. If the state courts deny due process of law or equal protection of the laws to anyone who reasonably raises the question, they are amenable to the corrective power of the Supreme Court of the United States. Scott v. McNeal 154 U.S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; Chicago, Burlington and Quincy R. R. v. Chicago 166 U.S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Buchner v. Marion R.R., 197 U.S. 568, 25 Sup. Ct. 538; 49 L. Ed. 872; Wylie Salt Co. v. Kharin Drainage District 239 U.S. 478, 484, 36 Sup. Ct. 204; 60 L. Ed. 398; Sommers v. Emery 245 U.S. 317; 320, 37 Sup. Ct. 638, 61 L. Ed. 1163. That principle we recognize and accept in all its amplitude."

Likewise in Chicago Burlington and Quincy Ry. v. Chicago 166 U.S. 226; 17 Sup. Ct. 581; 41 L. Ed. 979, the Supreme Court stated as

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follows at page 232 U.S

> "In Robey v. Colehour, 146 U.S. 153, 159, it was said that 'our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.' (citing cases.) There is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted by the defendant under the National Constitution were not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon its merits."

and further at page 234 U.S. it was said:

> "Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice--the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard--met the requirement of due process of law. United States v. Ormsbee, 92 U.S. 342, 344; Leeper v. Texas 139 U.S. 462, 468. But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U.S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."

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In McCoy v. Union Elevated R. R. Co. 247 U. S. 354; 62 L. Ed 156; 38 Sup. Ct. 504, 354; at page 363 U.S. it was said:

> "We may examine proceedings in state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation. If the necessary result was to deprive him of property without such compensation then due process of law was denied him, contrary to the Fourteenth Amendment. Chicago Burlington & Quincy R. R. Co. v. Chicago 166 U.S. 226, 241; Backus v. Fort Street Union Depot Co., 169 U.S. 557, 565; Fayerweather v. Ritch 195 U.S. 276, 298. Our concern is not to ascertain whether the rule adopted by the State is the one best supported by reason or authority nor with mere errors in course of trial but with denial of a fundamental right. Appleby v. Buffalo 221 U.S. 524; 532. And see Hallevorn v. New York 229 U.S. 343, 371."

Also in Shelby v. Kraemer 334 U.S. 92 L. Ed. 1161; 68 Sup. Ct. 836; 17 U.S. the court said referring to the Fourteenth Amendment:

> "But the examples of state judicial action which have been held by this court to violate the amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process."

In Scott v. McNeal 154 U.S. 34; 14 Sup. Ct. 1108, 38 L. Ed. 896 the facts were as follows: Moses H. Scott sued John McNeal and Augustine McNeal in the Superior Court of Thurston County in the State of Washington to recover possession of a tract of land located in that County. It was admitted that title to the land in question had been in the plaintiff Scott until 1888. At that time Mary Scott a creditor and apparently no relative of Moses H. Scott filed a petition alleging his disappearance and belief in his death and asked that an R. H. Milroy be appointed administrator of his Estate. At the hearing evidence was given that

PAGE BOUND VERTICAL IN BOOK

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Moses H. Scott had disappeared under such circumstances as to cause his relatives to believe that he had been murdered. The Probate Court of Thurston County thereupon made a finding declaring Moses H. Scott legally dead and appointing R. H. Milroy administrator of the Estate. The property in question was sold by Milroy as Administrator of the Estate to one Ward under court order. Ward later sold and conveyed the land in question to defendants. Moses H. Scott when he learned of the sale in question brought this action. Upon the trial of the case the defendants McNeal claimed title in themselves as a result of the probate proceedings purporting to vest title in Ward and the subsequent transfer of course from Ward. In support of their contention they offered in evidence the probate proceedings. Plaintiff Scott objected on the ground that the probate proceedings were void, inasmuch as he was alive at all times during their inception and purported administration and that therefore the Probate Court had no right to issue letters of administration. The trial court in the State of Washington ruled that, the probate court having passed upon the sufficiency of the petition to give it jurisdiction, and having found that the law presumed Scott to be dead, its proceedings were not absolutely void. The plaintiff appealed to the Supreme Court of the State which upheld the ruling of the trial court and the proceedings before the Probate Court of Thurston County. The plaintiff thereupon sued out a writ of error to the Supreme Court of the United States. The Supreme Court of the United States after reviewing the entire body of law upon the subject held that the order of the Probate Court of the State of Washington appointing Milroy Administrator of the Estate of Scott while Moses H. Scott was still alive was void as were all proceedings based upon it and that the ruling of the Supreme Court of the State of

PAGE BOUND VERTICAL IN BOOK

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Washington upholding that order was erroneous and in effect deprived the plaintiff of his property without due process. The Supreme Court in the MaNeal case stated at page 45 of its opinion U.S:

> "After giving to the opinion of the Supreme Court of the State the respectful consideration to which it is entitled, we are unable to concur in its conclusion, or in the reasons on which it is founded.
>
> The Fourteenth Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, "nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These prohibitions extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities." (Citing cases).

The United States Supreme Court thereupon reversed the Judgment and ordered the case remanded to the Supreme Court of the State of Washington for further proceedings not inconsistent with its opinion. See also Muhlker v. Harlem Railroad Co. 197 U.S. 544; 25 Sup. Ct. 522; 49 L. Ed. 872. In this case the plaintiff was the owner of premises consisting of a five story building abutting upon Park Avenue in the City of New York. The New York and Harlem Railroad previously had been operating surface trains upon Park Avenue on double tracks one on the precise surface of the Avenue and the other in a trench about 5 1/2 feet below the surface of the ground. The Railroad was bounded upon both sides of the avenue by walls about three feet above the surface of Park Avenue. The plaintiff derived his title from one Poillon who was also the grantor to the city of the strip of land used as part of Park Avenue which ran in front of plaintiff's premises. The deed of conveyance from Poillon to the City contained a clause to the effect that the City should hold the strip of land so conveyed "in trust that the same be left open as public streets for the use and benefit of the inhabitants of said city forever." The court

PAGE BOUND VERTICAL IN BOOK

POOR COPY

found that this situation created a subservient tenement appurtenant to the lot upon which the brick dwelling stood said subservient tenement consisting of an easment of ingress and egress to the street as well as an easment of light and air. The plaintiff in the case became the owner of the lot in question in 1888. In 1891 he erected the five story brick building in question. Pursuant to chapter 339 of the Laws of 1892 defendant began construction of an elevated railroad in front of plaintiff's premises 31 feet above the surface of Park Avenue supported by iron columns six of which were directly in front of plaintiff's premises. Plaintiff sued for interference with his easment of light and air as well as asking for an injunction. It was pointed out by the court in its summary of the facts that the contemplated use of the elevated road would send 200 trains a day past plaintiff's house which would pour dirt, cinders, and smoke into his upper windows. The trial court under the authority of Lewis v. New York and Harlem 162 N.Y. 202 gave judgment for the plaintiff. A decree was entered by it enjoining the use of the railroad structure and its removal from in front of plaintiff's premises, but it was provided that the injunction should not become operative if the defendants tender for the purpose of execution by the plaintiff " a form of conveyance and release" to be delivered against $4,0 as and for damage to the easment and damage to the rental value of the premises. The Lewis case as pointed out by the Supreme Court held that the Railroad had by use of the surface of the street acquired a title as against the abutting land owner with respect to the use of that surface but no more. The Lewis case specifically held that when the Railroad commanded to use a steel viaduct

PAGE BOUND VERTICAL IN BOOK

POOR COPY

elevated above the surface it began a new trespass against the abutting landowner which was actionable. The Lewis case was based upon the decisions in the so-called elevated railroad cases. The first of these was Story v. New York Elevated R. R. Co. 90 N.Y. 122 decided in 1882 and Lahr v. Metropolitan Elevated R. R. Co. 104 N.Y. 268 decided in 1887. Both cases had been decided and were the law of the State of New York at the time plaintiff bought his property and built his five story brick building on it in 1891. Both cases held that the building of an elevated railroad and the operation of such with its steam engines which generated gas, steam and smoke and other noxious substances and interrupted the free passage of light and air constituted the taking of the easement of abutting land owners which they had acquired by grant of their title from the Municipal Authorities containing a covenant that streets which could be laid out should continue as other streets. The Appellate Division of N. Y. affirmed the decision of the N. Y. Supreme Court. The Court of Appeals of N. Y. reversed the Appellate Division and sent the case back to the N. Y. Supreme Court with instructions to dismiss the case with costs to the defendant. It was under this state of facts that the case reached the Supreme Court of the United States. The Supreme Court held that the Court of Appeals of N. Y. was virtually ignoring the law of the State of New York when it reversed the trial court in Muhlker v. Harlem Railroad Co. It pointed out that in so doing it was ignoring its own State decisions in Lewis v. Harlem Railroad and the Elevated Railroad cases which established certain property rights in connection with the property which plaintiff purchased and built upon in 1891 and that plaintiff having purchased his property before that time and having built upon it at that time

PAGE BOUND VERTICAL IN BOOK

POOR COPY

with certain property rights by way of an easement guaranteed to him by the existing decisions of the State of New York those property rights could not be infringed upon by a subsequent decision which ignored the established law of the State. The Court said at page 569 U.S:

> "The Lewis case, we have seen, was overruled by the Court of Appeals in the case at bar, while the Story and Lahr cases were said not to be in point. We think that the Lewis case was an irresistible consequence of the others, and the Story and Lahr cases are in point and decisive."

and on page 570:

> "When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation. And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence, the importance of the elevated railroad cases and the doctrine they had pronounced when the plaintiff acquired his property."

To the same effect see: Myles Salt Co. v. Iberia Drainage Dist. 239 U.S. 478; 36 Sup. Ct. 204; 60 L. Ed. 392. In this case the law of the State of Louisiana authorized Police Juries a group of persons selected in each Parish of the state to fix and establish drainage districts and to determine the boundaries thereof and the identity of the lands to be included therein and to provide for taxation of such lands in order to pay for the cost of operating the District. If the drainage district necessitated the inclusion of lands in more than one Parish the boundaries of such district were to be established by joint action of the

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POOR COPY

Police Juries of all the Parishes involved. In the present case the Iberia Drainage District was formed by the adjoining Parishes of St. Mary's and Iberia. The purpose of the Drainage District was to drain the low lying marshes and bayous surrounding Weeks Island upon which was located the salt deposits of the plaintiff company. The surrounding marsh lands and lands intended to be benefited by the formation of the drainage district had a maximum elevation of 15 feet while Weeks Island had a maximum elevation of 175. It was the contention of plaintiff that it received no benefit from the drainage district whatsoever and that therefore any tax levied upon its properties for the purpose of defraying the cost of operating the Iberia Drainage Dist. was a taking of property without due process. The plaintiff Myles Salt Co. accordingly filed a petition in the Louisiana State Courts alleging that it received no benefit from inclusion within the Drainage District;that its lands and properties did not need drainage at all because of their elevation and that their inclusion in said Drainage District by the Police Juries of Iberia and St. Mary's Parishes were solely and only for the purpose of securing revenue from plaintiff's properties by way of taxation without conferring any benefit upon plaintiff's lands at all. Plaintiff Salt Co.'s petition thereupon attacked the action of the Police Juries in including it within the Drainage District as arbitrary unjust and unreasonable and a taking of property without due process. The defendants excepted to the legal sufficiency of the petition thus admitting the truth of all of its allegations just as a general demurrer would in the State of California. The Louisiana District Court for the Parishes of Iberia and St. Mary's sustained the exception to the petition of plaintiff on the ground that the Police Juries had absolute power in the matter of the creation and establishment of drainage districts in the absence of an

PAGE BOUND VERTICAL IN BOOK

POOR COPY

allegation of fraud in the exercise of their functions. The Supreme Court of the State of Louisiana upheld the decision of the State District Court upon that theory stating that without an element of fraud alleged the lower court properly dismissed plaintiff's petition. It was upon this state of facts that the matter was brought before the United States Supreme Court. The defendants there urged that no Federal question was presented. The United States Supreme Court observed on page 484 U.S. as follows:

> "And such decision, it is further contended, was a decision upon the state law and presents no Federal question, the statute of the State not being attacked.
>
> We cannot concur in the contention. It is true the law of the State as written is not attacked, but the law as administered and justified by the Supreme Court of the State is attacked and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal and the motion to dismiss is denied. And the considerations that move a denial of the motion move a decision of the merits of the question."

The Supreme Court thereupon went on to hold that where there was an inclusion of property in a drainage district for the sole and only purpose of rendering it subject to charges the proceeds of which could be used only to benefit property other than the property taxed and without any benefit to said property taxed confiscation and a taking of property without due process were present by reason of the action of the Louisiana Police Juries in bringing about such a condition and the action of the State Courts in upholding it. The judgment of the Supreme Court of Louisiana was thereupon ordered reversed. In Hopkins v. Clemson College 221 U.S. 636; 31 Sup. Ct. 654; 55 L. Ed. 890 the trial court of the state of South Carolina had dismissed a bill of complaint on the ground that the State was a necessary party to the suit and had not consented to be sued. The State Supreme Court of the State of South Carolina upheld the action of

PAGE BOUND VERTICAL IN BOOK

POOR COPY

of the trial court and in effect held that the complaint did not therefore state a cause of action. The suit was brought against Clemson College upon a complaint which alleged that the building of a dyke by said College had so diverted the natural flow of the Seneca River as to cause it to overflow plaintiff's lands ruining the value thereof. Plaintiff asked for damages as well as injunctive relief. The Supreme Court of the United States in the above case in reviewing the record held that it was apparent from the face of the record that Clemson College was not sued in connection with any governmental function but for a private corporate act which any private individual might have committed and therefore became liable for the consequences thereof. It held that the State of South Carolina was not therefore a necessary party to the action and hence plaintiff's complaint stated a cause of action which made it error for the trial court of the State of South Carolina to dismiss the bill of complaint and wrongful of the Supreme Court of the State to sustain that action. The action of the South Carolina Courts was thereupon reversed.

Saunders v. Shaw 244 U.S. 317; 37 Sup. Ct. 638; 61 L Ed. 1163. There it was said at page 319 U.S.:

> "He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefitted, the defendant was not bound to go on and offer evidence that he contended was inadmissable, in order to rebut the testimony already ruled to be inadmissable in accordance with his view. The Chief Justice and Mr. Justice O'Neill were of the opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the Supreme Court thought that it was

PAGE BOUND VERTICAL IN BOOK

POOR COPY

> so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Company's Case that to remand it would be an empty form--a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

In this case the Louisiana State Supreme Court had decided the case in favor of the plaintiff in error but after the Myles Salt Co. case came down it reversed itself and ordered judgment for the defendant in error who was seeking to enjoin the collection of taxes upon his lands in the Bayou-Terre-Aux-Boeufs Drainage District. He brought the suit on the ground that his lands were outside the levee system and derived no benefit from the system the commissioners were building. As pointed out the trial court rejected any evidence to show that plaintiff would receive no benefit and thereby indirectly precluded defendant intervenor and plaintiff in error from introducing any evidence to show that plaintiff in the trial court actually did receive some benefit from the drainage district. The Supreme Court as can be seen declared it was a lack of due process to deny him this opportunity even though it was more than likely that he would be unable to prove his point.

In Coombs v. Getz 285 U.S. 434; 76 L. Ed. 866; 52 Sup. Ct. 435 where a California trial court had sustained a demurrer which was apparently not justified and that action was upheld by the California State Supreme Court the United States Supreme Court held that the petitioner had stated a good cause of action in the California Courts and reversed the action of the State Court. It would appear from the foregoing authorities that where the State Courts either ignore or rule contra to the established law of their particular State or the fundamental precepts of basic

PAGE BOUND VERTICAL IN BOOK

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common law where no particular statute is involved and in so doing deprive a plaintiff of his day in court or take away from him established property rights the United States Supreme Court will reverse the decision of the State Courts in that regard where the highest Court of the State has acted. Let us then apply this law to the present case. In this case the Petitioner filed an ordinary action for the recovery of money which had been paid out to discharge the obligation of a promissory note which had been secured by fraud and for which it was alleged no actual consideration had been given to Petitioner. Defendants Marcollo and Cannelora demurred under Section 430 of the California Code of Civil Procedure which provides that a demurrer may be made on grounds that the complaint does not state a cause of action as well as numerous special grounds including uncertainty, ambiguity, unintelligibility and misjoinder or non joinder of parties. The trial court sustained the demurrer to the original complaint. It granted plaintiff and Petitioner ten days to amend but did not specify upon what grounds the demurrer was sustained. It is contended that under those circumstances an amendment which would cure any of the grounds urged as a basis for the demurrer would have been a bona fide attempt to amend especially in view of Petitioner's contention that only one of the special grounds of the demurrer was well taken. Petitioner as pointed out amended to separate causes of action which he recognized might require different proof and present different issues with respect to the various defendants involved. If Petitioner's complaint still contained defects the normal procedure under the California Law was to file another demurrer. Respondents chose to make a motion to strike the entire amended complaint from the record as sham and frivolous. That motion

PAGE BOUND VERTICAL IN BOOK

POOR COPY

was granted as previously stated. There is no authority in the California Law which authorizes a trial court to strike from its records a complaint which states a good cause of action. On the contrary the entire body of California Law is the other way. In Miller v. McLaglen (1947) 82 C.A. 2nd 219; 186 P. 2nd 48 at page 228 C. A. 2nd it was said:

> "A complaint should never be dismissed unless it appears to a certainty that no basic right of action can possibly exist or no relief can possibly be granted. It is a rare case when a litigant may be denied his day in court without a hearing."

In other words the same facts and circumstances are required to justify a trial court in dismissing a complaint as would be necessary to justify it in sustaining a demurrer without leave to amend. Consequently that line of cases which show under what circumstances a court should grant leave to amend with reference to the allegations of a complaint should be helpful here. The cases are unanimous that where a complaint states a cause of action or can be amended to state a cause of action it is reversible error for the trial court to sustain a demurrer without leave to amend. In George v. Weston 26 C.A. 2nd 256 at page 262 it was said:

> "We think, however, that the trial court fell into error in entering judgment for the defendant without affording the plaintiff opportunity to amend.---------From an inspection of the original complaint it could not be determined that the plaintiff would be unable to so amend it as to state a cause of action and eliminate the uncertainty complained of. The plaintiff was not required to apply to amend his complaint in advance of the ruling on the demurrer. (Shaake v. Eagle etc. Can. Co. 135 Cal. 472, 480; 63 Pac. 1025; 67 Pac. 759) The trial court should therefore have allowed an amendment."

In Hillman v. Hillman Land Co. 81 C.A. 2nd 174; 183 P. 2nd 720 at page 181 C.A. 2nd it was said:

> "Unless it is clear that a complaint does not state a cause of action and cannot be so amended as to

PAGE BOUND VERTICAL IN BOOK

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obviate the objections thereto it is error to refuse permission to amend. (Hammer v. Ellis 40 Cal. App. 57, 59; 180 P. 30; Payne v. Baehr 153 Cal. 441; 447; 95 P. 895; Shaake v. Eagle Automatic Can Co. 135 Cal. 472, 480; 63 P. 1025; 67 Pac. 759)."

Code of Civil Procedure 472 C provides as follows:

"Question presented on Appeal from order sustaining demurrer without leave to amend. When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such Court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made; provided, that this section shall not apply to any pending action or proceeding. (Added by Stats. 1939 P. 2235)."

The proper rule in such matters is stated by the California Supreme Court in Wennerhelm v. Stanford Univ. Sch. of Med. 20 C. 2nd 713 at page 718:

"Various grounds of special demurrer also were advanced before the trial Court. Defendants contend, relying upon such cases as Haddad v. McDowell 213 Cal. 690; 3P. 2nd 550 that plaintiff's failure to request leave to amend requires that this court affirm the judgment of the trial court if any of the grounds of special demurrer is well taken. Where a complaint is sufficient against a general demurrer however, and any uncertainties or ambiguities in the pleading can be corrected by amendment, it is apparent that denial of leave to amend results in a disposition of the cause upon technical grounds alone. The plaintiff who has stated a cause of action in such a case is denied a trial on the merits of his action, if any of the grounds of special demurrer is well taken, despite the fact that the deficiencies can be corrected. It has been held, under such circumstances, that denial of leave to amend constitutes an abuse of discretion even though it be conceded that the trial court had authority to sustain the special demurrer because of defects in the form of pleading. (Guilliam v. Hollywood Hospital 18 Cal. 2nd. 97, 104; 114 P. 2nd 1; Olivera v. Grace 19 Cal. 2nd 570, 579; 122 P. 2nd 564 and cases cited therein)."

As was said in Black v. Browne 37 C.A. 606 at page 608:

"Whether plaintiff's complaint in its present form and substance states a cause of action need not be determined. It is sufficient to note that plaintiff was entitled to the opportunity to amend as requested, for it cannot be determined from the present state of the record that plaintiff was seeking the legally impossible. As was declared in Adkins v. San Francisco, 8 Cal. App. 2nd 620; 47 Pac. 2nd 751, "From a reading of the complaint

PAGE BOUND VERTICAL IN BOOK

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in question, it appears that plaintiff was attempting to state a cause of action in good faith. It is not at all clear that plaintiff could not have amended and obviated the objections raised by the demurrer."

the court then says on the same page:

"For the foregoing reasons the judgment based upon an order sustaining the demurrer to plaintiff's complaint is affirmed, but that portion of the judgment based upon an order denying leave to amend is reversed, with direction that such judgment based upon such an order be modified to enable plaintiff to amend."

In 21 Cal. Juris. Pleading Sec. 1167; page 242 it is said:

"But a motion to strike is not the proper method of attacking a pleading which is merely insufficient to state a cause of action or defense, or which is defective in form, where the objection may be reached upon demurrer, or if the pleading is susceptible of being amended by a statement of facts known to exist and which constitute a cause of action or defense."

In Vol. 2 Witkin's California Procedure Pleading Sec. 511 Page 1505 it was said:

"It would seem improper as well as confusing to use a motion to strike an apparently good pleading as sham, collusive or moot, for striking the complaint is a procedural step which implies that a pleading in proper form could be filed."

Furthermore to refer to a pleading as a sham which even sets forth the semblance of a cause of action is erroneous. In McClung v. Watt 190 Cal. 155: 211 P. 17 at page 160 Cal. it was said:

"If the allegations in question did no more than shadow forth the semblance of a cause of action they would be proof against assault upon the ground that they were sham and frivolous. (Giles Lithographic etc. Printing Co. v. Decamier Mfg. Co. 14 Daly (N.Y.) 475; Win v. Waring, 2 Brev. (S.C.) 428; Hogencamp v. Ackerman, 24 N.J.L. 133; Marshall v. Hamilton, 41 Miss. 229, 235; Walter v. Fowler, 85 N.Y. 621; Bradner v. Faulkner N.Y. 515)."

Not only that but the California courts have refused to dismiss a complaint which states a good cause of action even though there was a strong indication aliunde the complaint that the action could not be successfully maintained at the time of trial.

PAGE BOUND VERTICAL IN BOOK

POOR COPY

In Byer v. Arguello 96 C.A. 2nd 92; 214 P. 2nd 556, it was said at page 93 C.A. 2nd:

> "From a consideration of the record therein, we are satisfied that the pleadings in this action present triable issues. We are equally satisfied that our holding on the motion to dismiss (Byer v. Arguello supra) is determinative of this appeal on the merits. In the cited case we said (p. 111):
>
> > "Courts have inherent power to dismiss actions upon the grounds that they are fictitious or sham. Such a motion to dismiss is proper practice, but in each case the question arises whether the specific facts presented to the court constitute grounds for an order of dismissal. (Cunha v. Anglo-California Nat. Bank, 34 Cal. App. 2nd 383; 93 P. 2nd 572).
> >
> > In the present case the complaint specifically alleges that the Kramer dog killed the child. While it is true that the child's father in his deposition testified to facts contrary to the allegations of the complaint which he verified, it is better practice to dispose of issues by trial. Before a motion to dismiss may be granted the record must disclose that no relief can be granted to the plaintiff. (People v. Nixon 34 Cal. 2nd 234; 209 P. 2nd 385). From the complaint and the affidavits here under consideration, it cannot be said that beyond peraventure of doubt no cause of action can be proven against the Kramers."

The Byer case presented a much stronger set of facts to support a dismissal than do the circumstances of the case at bar. See also North Hollywood Mtg. Co. v. Henshey (1932)126 C.A. 411, 14 P. 2nd 842 where the action of the trial court in dismissing a complaint which stated a good cause of action was reversed. In addition see the following pertinent California cases:

Maguire v. Hibernia Sand L. Soc. 23 C. 2nd 719, 737; 146 P. 2nd 673, 151 A.L.R. 1002 where the court held the trial court erred in sustaining a general demurrer and dismissing the action.

Hancock Oil Co. v. Hopkins (1944) 24 C. 2nd 497, 510; 150 P. 2nd 463 to the same effect.

Ginsberg Tile v. Faraone (1929) 99 C.A. 381; 278 P. 866.

Black v. Browne (1940) 39 C.A. 2nd 606; 103 P. 2nd 1012.

PAGE BOUND VERTICAL IN BOOK

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Craninger v. Fischer 81 C.A. 2nd 549; 184 P. 2nd 694.

Duffy v. Duffy 82 C.A. 2nd 203; 186 P. 2nd 61 where the action of the trial court in sustaining a demurrer to defendant's second amended cross-complaint and striking it from the files was reversed.

Guilliams v. Hollywood Hospital (1941) 18 C. 2nd 97; 114 P. 2nd 1.

Campbell v. Veith 121 C.A. 2nd 735; 264 P. 2nd 226 where it was said at page 743 C.A. 2nd:

> "It is the established rule that when a complaint by direct allegations, references or conclusions, however indefinitely or defectively drawn, shows that the plaintiff has a cause of action and that he is entitled to some relief, a general demurrer should not be sustained without leave to amend, and particularly so if the complaint is subject to amendment. (Kaufman v. Bobo J. Wood 99 Cal. App. 2nd 322; 221 P. 2nd 750; Roberts v. Wachter 104 Cal. App. 2nd 281; 231 P. 2nd 540; Speegle v. Board of Fire Underwriters 29 Cal. 2nd 34, 42; 172 P. 2nd 867)."

Washer v. Bank of America (1943) 21 C. 2nd 822, 833; 136 P. 2nd 297 where it was held to be an abuse of discretion to deny leave to amend a second amended complaint.

Kraft v. Smith (1944) 24 C. 2nd 124, 132; 148 P. 2nd 23.

Blair v. Mahon 104 C.A. 2nd 44, 52: 230 P. 2nd 832. Held to be an abuse of discretion to reject an amendment to a second amended complaint.

Olivera v. Grace 19 C. 2nd 570, 579; 122 P. 2nd 564; 140 A.L.R. 1328.

Wilk v. Vencill 30 C. 2nd 104, 109; 180 P. 2nd 351.

Arnold v. Howell 98 C.A. 2nd 202, 208; 219 P. 2nd 854.

Jensen v. City of Modesto 89 C. A. 2nd 835; 202 P. 2nd 332.

The entire body of the California Law as represented by the above cited cases has disapproved the summary dismissal of a complaint which states a good cause of action even though it contains defects in form.

There is no doubt that Petitioner's Amended Complaint did state

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a cause of action against Cannelora and Marcollo. In the first place Petitioner had a clear right to recover back money he had paid out under a promissory note secured from him by fraud in a transaction accompanied by lack of consideration or failure of consideration. The California Law clearly gave Petitioner that right.

Philpott v. Superior Court 1Cal. 2nd 512, 518; 522, 523; 36 P. 2nd 635.

Single vs. White 111 Cal. App. 683, 687; 296 P. 119.

Powell v. Johnson 50 C.A. 2nd 680, 683; 123 P. 2nd 875.

S. C. V. Peat Fuel Co. v. Tuck 53 Cal. 304, 305.

Hayes v. County of Los Angeles 99 Cal. 74, 79; 33 Pac. 766.

Richter v. Union Land etc. Co. 129 Cal. 367, 373; 62 P. 39.

Woodham v. Allen 130 Cal. 194; 62 Pac. 398.

McAllister v. Drapeau 14 C. 2nd 102; 92 P. 911.

Morrison v. Landers 56 C.A. 2nd 607; 133 P. 2nd 34.

McCall v. Superior Court 1 Cal. 2nd 527; 530; 36 P. 2nd 642; 95 A.L.R. 1019.

Lewis v. Fahn 113 C.A. 2nd 95, 96, 101; 247 P. 2nd 831.

Calhoun v. Davis 121 C.A. 2nd 167, 170; 262 P. 2nd 620.

Morrell v. Clark 106 C.A. 2nd 198, 234; P. 2nd 774.

McMillan v. Richards 9 C. 365, 419.

That right of Petitioner extended to the agents Marcollo and Cannelora. Petitioner clearly stated a cause of action against them. He alleged that in collecting the money for their principal Julia Prettner said agents acted with full knowledge of the defects and defenses pertaining to the note in question with reference to the misrepresentations, failure of consideration and duress and compulsion. In fact the defendants Marcollo and

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Cannelora participated in the duress and compulsion. There seems to be no doubt that under such circumstances the agent is liable with his principal. In the Restatement of the Law of Agency Chapter 11 Sec. 339 page 745 the following statement appears:

> "An agent who has received things from another for a disclosed or partially disclosed principal has a duty to return them or their proceeds if the other rescinds the transaction by which they were received for a cause existing at the time of their receipt, to the extent that the agent has not, before notice of recission and in good faith, changed his position."

Under Comment "B" the following statement appears:

> b. Subject matter. The transaction rescinded may be the payment of a supposed debt, the performance of a contract, the making of a gift, or any other transaction involving the transfer of land, chattels, choses in action, or money to the agent for the principal's account.

at page 746 the following statement appears:

> c. Cause of recission. The transaction may be voidable because of a misrepresentation by the agent as to his authorization or as to a material fact which would avoid the transaction if the agent were authorized; it may be because of a misrepresentation by the principal, a mutual mistake, or any other fact existing at the time of the transaction which is a cause for recission by the other party.

Further on page 746 the following statement appears under Illustrations:

> 2. P. the owner of a ship insured with T., scuttles the ship. Acting for P., A receives the insurance money from T, but before paying it to P learns the facts concerning the loss of the ship. Upon his refusal to repay it, A is subject to liability to T for the amount received.

on page 747 the following language appears:

> "If the agent has notice that the other has rescinded or, if he learns of facts from which he should realize that the other is entitled to and will demand recission, as where the agent or principal was fraudulent in inducing the transaction, a subsequent change of position does not relieve him from the duty of returning what he has received. (See Illustration 2).

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In restatement of Restitution Amer. Law. Inst. Chap. 8 Sec. 143 at page 581 the following statement appears:

> c. Knowledge or fault of fiduciary. If the fiduciary makes a payment with knowledge of the ground for restitution, the payment is not a defense. This is true both where the fiduciary obtained the money or other things by a consciously wrongful act and where before payment over, he was aware of fraud or duress of the principal or of the mistake by the transferor."

In Stirmus v. Adams 50 C.A. 730; 195 P. 955 at page 734 C.A. it was said:

> "Defendant Lyon cannot escape liability on account of having acted as the agent of his co-defendant in inducing the plaintiff to enter into the contract of purchase, nor because he paid the money over to his principal. He knowingly participated in the transaction, held to have been fraudulent, and is equally responsible with his co-defendant for the return of the money. (Mechem on Agency, 1458; Moore v. Shields 121 Ind. 267; 23 N.E. 89; Gray v. Mills 164 Cal. 481, 129 Pac. 791, 2 C.J. 827; Sec. 2343 Civ. Code.)

It would certainly appear from the foregoing that Petitioner's complaint set forth a good cause of action against the Respondents Marcello and Cannelora under the laws of the State of California. A cause of action when filed in a State Court has been recognized as a property right subject to the same Constitutional protection as other property rights. In Sliosberg v. New York Life Ins. Co. 216 N.Y.S. 215; 217 App. Div. 67 at page 223 N.Y.S. it was said:

> "When an action is instituted in the state court, the right of action becomes property within the state, and is then subject to the constitutional protection against its deprivation by any state law. We believe the act operates as a deprivation of property within the state without due process of law.
> It is likewise certain that this mandatory stay violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution, in that, at the time of the institution of the suit, plaintiff was present within the jurisdiction, and was entitled under the equal protection clause of that amendment to have his action determined in accordance with the same rules of law and procedure which the courts of this state would apply to any other action of the same character."

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Under these circumstances Petitioner's complaint as well as the substantive rights which it set forth constituted clearly established property rights under the laws of the State of California. These property rights were swept away by the action of the trial court of the State of California in contravention of its own time honored and well established rules of law of that State as well as the recognized law of the land. This clearly constituted a taking of property without due process as well as denying Petitioner the equal protection of the laws of his own State. This fact was called to the attention of the Supreme Court of the State of California in Petitioner's Petition for a hearing before that high court. Nevertheless that court upheld the action of the trial court. In so doing it countenanced, recognized, and condoned a violation of Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States. It is respectfully submitted that under all the circumstances the Federal question of lack of due process and denial of equal protection was seasonably raised.

In Sullivan v. Texas 207 U. S. 416 at 422 U. S. it was said:

> "By the action of the Supreme Court of the State the judgment of the Court of Civil Appeals became the judgment of the highest court in the State to which the case could be taken, and hence the writ of error properly ran to that court. The constitutional question, although not raised theretofore, was distinctly presented in the petition to the Court of Civil Appeals for a rehearing, was considered by that court and decided adversely to the plaintiff in error. This court therefore has jurisdiction."

In Dewey v. Des Moines 173 U. S. 193; 43 L Ed 665; 19 Sup. Ct. 379; at page 199 U. S. it was said:

> "Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party and then, if the decision of the court, while

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not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law. Roby v. Colehour 146 U.S. 153, 159; Chicago, Burlington & Railroad v. Chicago, 166 U.S. 226, 231; Green Bay & Company v. Patten Paper Co., 172 U.S. 58, 68 and Bank of Lincoln v. Bank of Cadiz 172 U.S. 425.

"In all these cases it did appear from the record that the rights were set up or claimed in such a way as to bring the subject to the attention of the state court."

Also in Missouri, Kansas etc. Ry. Co. v. Elliot 184 U.S. 530; 46 L. Ed 673; 22 Sup. Ct. 446 it was said at page 533 U.S:

"The general rule undoubtedly is that those Federal questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the state court intended to and did assert such a Federal right in the state court. But it is equally true that even although the allegations of Federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the attention of the state court, yet if the state court in deciding the case has actually considered and determined a Federal question, although arising on ambiguous averments, then a Federal controversy having been actually decided the right of this court to review obtains. Oxley Stove Co. v. Butler 166 U.S. 648, 660. All that is essential is that the Federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal.

It is respectfully submitted that under the foregoing authorities the Federal question was sufficiently and timely raised by Petitioner in the State courts below. Petitioner respectfully submits that under all the law and the facts pertinent to this case a Writ of Certiorari should be granted.

Ella Jackson

Petitioner Pro Se.

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